IN THE

Supreme Court of the United States

October Term, 1958

No.

IN THE MATTER OF

MUSSA C. BATEH

Petitioner,

vs

STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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OPINIONS BELOW

The order entered by Judge A. Lloyd Layton, Judge of the Provisional Criminal Court of Duval County, Florida, during October Term which was entered on November 3, 1955 A.D., Case No. 11801 (R. 9).

The order entered by Judge A. Lloyd Layton of the Criminal Court of Record of Duval County, Division B, on December 18, 1956 A.D., Case No. 11801 (R. 10).

The order entered by Judge A. Lloyd Layton, Judge of the Provisional Criminal Court of Duval County on November 3, 1955 A.D., Case No. 11802 (R. 19).

The order entered by Judge A. Lloyd Layton, Judge of the Criminal Court of Record for Duval County on April 9, 1957 A.D., Case No. 11802. (R. 20)

The opinion of the First District Court of Appeal filed April 1, A.D. 1958, Case No. A-101 in the District Court of Appeal which was case No. 11801 in the lower court as reported in 101 So. 2d 869.

The opinion of the First District Court of Appeal filed April 1, A.D., 1958, Case No. A-118, in the District Court of Appeal which was case No. 11802 in the lower court as reported in 191 So. 2d 876. (R. 99-100)

The opinion on re-hearing by the First District Court of Appeal Case No. A-101, formerly Case No. 11801, filed April 29, 1958. (R. 109-112) (Not Reported)

The revised and substituted opinion on rehearing filed June 26, A.D. 1958, in Case No. A-101, (R. 113--117) as reported in 101 So. 2d 874.

The opinion and the denial of a rehearing by the Supreme Court of Florida on the consolidated cases filed on February 25, A.D. 1959, and reported in 110 So. 2d 7. Rehearing was denied April 9, 1959 without opinion. (R. 162--168)

JURISDICTION

In invoking the jurisdiction of this Court petitioner relies upon the following:

The judgment dated January Term A.D. 1959, and entered February 25, A.D. 1959, by the Supreme Court of Florida. (R. 162--168)

The State of Florida filed its Petition for Rehearing and Clarification on March 7, A.D. 1959. Said Petition was denied April 9, A.D. 1959, by the Supreme Court of Florida. (R. 173--176, 178)

The Petitioner, Mussa C. Bateh, filed his Petition for Rehearing on March 12, 1959. Said Petition was denied on April 9, A.D. 1959 by the Supreme Court of Florida. (R. 180--182, 184)

Thereafter, Petitioner, Mussa C. Bateh, petitioned the Supreme Court of Florida for an Order Staying Mandate of the Supreme Court of Florida on April 20, 1959, and that on April 20, 1959, the Honorable Glenn Terrell, Chief Justice of the Supreme Court of Florida, entered an order staying said mandate for a period of sixty (60) days from said date. (R. 190)

Thereafter Petitioner petitioned the Supreme Court of Florida for an order staying the mandate of the Supreme Court of Florida for an additional period and on June 18, 1959 the Supreme Court of Florida entered an Order Staying the Mandate until July 8, 1959.

Jurisdiction to issue the writ rests on Rules 19 and 22, Revised Rules of the Supreme Court of the United States and 28 United States Code, Section 1257.

QUESTIONS PRESENTED

1. The Petitioner's rights guaranteed him under Section 1, Amendment XIV of the Constitution of the United States were violated in that, the "resentencing" imposed on December 18, 1956, was in derogation of his rights under the Constitution as aforesaid.

2. That the Petitioner's rights guaranteed him under Section 1, Amendment XIV of the Constitution of the United States were violated in that, the "resentencing" imposed on April 9, 1957, was in derogation of his rights under the Constitution as aforesaid.

3. That the opinion of the District Court of Appeal, First District of Florida, the opinion rendered on Rehearing by the District Court of Appeal, First District of Florida, and the Revised and Substituted Opinion on Rehearing violated the Petitioner's right of due process by improperly interpreting Section 1, Amendment XIV of the Constitution of the United States.

4. That Petitioner's rights under Section 1, Amendment XIV of the Constitution of the United States was violated by the interpretation and application placed upon Florida Statutes 9408.01 by the Appellate Courts of the State of Florida as applied to the instant case.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1, Amendment XIV, Constitution of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

Section 1, Declarations of Rights, Constitution of the State of Florida

> § 1. Personal rights
> Section I. All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursueing happiness and obtaining safety.

Section 11 Declaration of Rights, Constitution of the State of Florida

> In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him.

Section 12, Declarations of Rights, Constitution of the State of Florida

§ 12. Double jeopardy; compelling testimony; due process of law; eminent domain

Sec. 12. No person shall be subject to be twice put in jeopardy for the same offence, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation.

Section 22, Declaration of Rights, Constitution of the State of Florida

§ 22. Searches and seizures; warrants

Sec. 22. The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons; and thing or things to be seized.

STATUTES INVOLVED

Florida Statutes 1957, 948.01

(4) In no case shall the imposition of sentence be suspended and the defendant thereupon placed on probation unless such defendant be placed under the custody of said parole commission except as provided in §949.02.

STATEMENT OF THE CASE

The Petitioner, Mussa C. Bateh, a licensed pharmacist, appeared before the Honorable A. Lloyd Layton, Judge of the Provisional Criminal Court of Duval County, Florida, on November 3, 1955, to answer to two informations each containing two counts, alleging violations of the Narcotic Drug Law. (R. 7--9, 17 18) The petitioner entered a plea nolo Contendre to each count of both informations. Thereafter petitioner was adjudged guilty by the Court on each count of both informations and the court then made the following pronouncement in both cases:

> It is considered by the Court that the passing of sentence herein be deferred from day to day and term to term until finally disposed of, and the Court herein expressly reserves jurisdiction of this cause to impose sentence herein at a later date as this Court may deem advisable. (R. 9 and 19)

The Petitioner was thereupon released upon his own recognizance in both cases. Thirteen (13) months later, after eight (8) terms of Criminal Court had passed, the petitioner was brought before Judge Layton on the 18th day of December 1956, in the Criminal Court of Record of Duval County, Florida, Division B, at which time the Court made the following pronouncement with regard to Criminal Case No. 11801, being the first information heretofore referred to:

> It is, Ordered by the Court that the order heretofore entered on November 3rd, 1955, deferring sentence from day to day and term to term, and releasing defendant on his own recognizance, be and the same is hereby Vacated and Set Aside.
>
> The defendant, Mussa C. Bateh, having heretofore been

adjudged guilty by the Court on the 3rd day of November, A.D. 1955 of the offense of Violation of Narcotic Drug Law, as charged in the information herein; and the defendant being personally present, was again asked if he had anything to say why the sentence of the law should not be pronounced upon him and saying nothing sufficient; It is, thereupon, Considered by the Court and it is the sentence of the law and the judgment of the Court that you, Mussa C. Bateh, be delivered by the Sheriff of Duval County, Florida to the State Prison of the State of Florida, and there be delivered to the proper officer thereof, there to be confined at hard labor for the period of TWO YEARS. (R. 10)

Thereafter Petitioner filed his Notice of Appeal to the Supreme Court of Florida and was released on Supersedeas Bond pending the diligent prosecution of his appeal in this case only. (R. 11)

One and one-half years later, after ten (10) terms of Criminal Court had expired petitioner was again brought before Judge Layton in the Criminal Court of Record, Division B, of Duval County, Florida, on April 9, 1957, at which time the Court vacated its order of November 3, 1955 in Criminal Case No. 11802, being the second information referred to above, (R. 20, 21) at which time Petitioner was sentenced to two years at hard labor, said sentence was to begin to run from the date of completion of the former sentence.

The Petitioner filed Notice of Appeal (R. 22) and was thereupon released on posting Supersedeas Bond in the second case conditioned upon his diligent prosecution of an appeal to the Supreme Court of Florida.

Before any action could be taken on either of these appeals by the Supreme Court of Florida a constitutional amendment was passed creating an intermediate appellate court known as the District Court of Appeal. Both of Petitioner's appeals heretofore mentioned were transferred to the District Court of Appeal for the First District of Florida, and the aforesaid cases were resignated by the said District Court of Appeal as Cases No. A-101 and A-118, respectively. Subsequently, on joint motion, the two cases were consolidated for the purposes of appeal.

On April 1, 1958, the District Court of Appeal, First District of Florida handed down its original decision in case No. A-101 which held in substance, that the deferral of sentence for an indefinite period violated the Petitioner's Constitutional rights of due process of law, and therefore his first sentence was to be considered to have been fully served and his bondsman was to have been discharged. (R. 89--98)

On the same date, April 1, 1958, the same Court handed down its opinion in Case No. A-118 wherein the prior decision was reaffirmed and ordered the Petitioner to be committed according to the views expressed in the said opinions. (R. 99, 100)

The Petitioner filed a Petition for Rehearing in both cases. The Respondent filed a Petition for Rehearing and Modification in both cases. The District Court of Appeal, First District of Florida, on April 28, 1958 denied the petitions for rehearing as to both parties with opinions. (R. 109--112) Thereafter, on June 26, 1959, the District Court of Appeal, First District of Florida, granted the motion of the Respondent to modify its opinion and handed down a revised and substituted opinion. (R. 113--117) The revised opinion deleted certain portions of the earlier opinion which applied to credit

for the time that Petitioner was free on supersedeas bond, but adhered to the initial ruling relating to the deferred imposition of sentence. The Respondent filed a motion with the District Court of Appeal, First District of Florida to certify the question to be of great public interest (R. 118-121), which motion was denied on the grounds that adequate remedy existed to have this case reviewed by certiorari to the Supreme Court of Florida.

The Respondent filed in the Supreme Court of Florida its Notice of Direct Appeal on July 23, 1958 (R. 23) and its Assignment of Error and Directions to the Clerk on July 30, 1958. (R. 125--129)

Petitioner, on July 11, 1958, filed in the Supreme Court of Florida his Petition for Writ of Certiorari. (R. 136--142) Then Respondent filed in the Supreme Court of Florida its Petition for Writ of Certiorari on August 20, 1958. (R. 144-148) A joint Motion to Consolidate the Record on Appeal was filed on August 25, 1958; (R. 150) said Motion was granted by the Supreme Court of Florida on September 3, 1958. (R. 152) Thereafter there was filed a joint motion to consolidate the pleadings and allow the initial briefs of the State of Florida to serve as its briefs in the certiorari proceedings brought by Mussa C. Bateh, Petitioner. (R. 154-156)

On December 16, 1958, the Supreme Court of Florida on its own motion set oral argument on the consolidated causes for January 13, 1959. (R. 160) After oral argument had been heard the Supreme Court of Florida requested additional briefs from both parties. On February 25, 1959, after having considered argument of counsel for the respective parties and upon consideration of the transcript of the record, the

briefs and petitions for writ of certiorari, the Supreme Court of Florida did render its opinion, wherein they expressly modified the prior decision of Collingsworth v. State, sic (Mayo), 77 So. 2d 843, and the cases cited therein. The Court then went on to say that while it appeared there was a prima facie showing that there was a conflict created by Petitioner's petition for writ of certiorari and the Respondent's petition for writ of certiorari and its direct appeal, the Court felt that said conflict was resolved by its decision in the case of Helton v. State, 106 So. 2d 79, which decision was rendered subsequent to the petitions for writ of certiorari and appeal in the instant case. The petitions of both parties were discharged and Respondent's appeal was denied. (R. 168)

On March 7, 1959, the Respondent filed a petition for rehearing and clarification (R. 173-176) and the Supreme Court of Florida, on April 9, 1959, denied said petition for rehearing and clarification. (R. 178)

On March 12, 1959, Petitioner filed its petition for rehearing (R. 180-182) and on April 9, 1959, the Supreme Court of Florida denied said petition. (R. 184)

The Federal questions were first raised on December 18, 1956 at the hearing before the Honorable A. Lloyd Layton, Judge of the Criminal Court of Record, Division B, Duval County, Florida, in case No. 11801, at which time counsel for the Petitioner objected to any further proceedings on the grounds that said proceedings were a violation of Petitioner's Constitutional rights. Said objection was overruled by the Court. (R. 31) The same objection was raised at the hearing before the Honorable Judge A. Lloyd Layton on April 9,

1957, and the same ruling was given in case No. 11802. (It will be noted that there has been no reference to the record made here because the record in the second case was not made a part of the transcript of record. However both sides conceded that the question was raised in the same manner with the same ruling in the second case.)

The Federal questions were thereafter perpetuated in the Assignments of Error in both cases to the District Court of Appeal, First District of Florida, and are more specifically set out as follows:

Case No. 11801:

1. That the judgment and sentence entered by the Court in the above entitled cause on the 18th day of December, 1956 violated the defendant's constitutional rights under the Constitution of the State of Florida more particularly sections 1, 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida.

2. That the judgment and sentence entered by the Judge in the above entitled cause on the 18th day of December, 1956 violated the constitutional rights of the defendant under the Constitution of the United States, more particularly Amendment 14, section 1, of the Constitution.

3. That the judgment entered by the Judge originally in the above entitled cause deferring the imposition of sentence from day to day and from month to month is unconstitutional, having violated the constitutional rights of the defendant in regard to both the Constitution of the United States and the Constitution of the State of Florida.

Case No. 11802:

1. That the judgment and sentence entered by the Court in the above entitled cause on the 9th day of April, 1957, violated the defendant's Constitutional rights under the constitution of the State of Florida, more particularly sections 1, 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida.

2. That the judgment and sentence entered by the Judge in the above entitled cause on the 9th day of April, 1957, violated the Constitutional rights of the defendant under the Constitution of the United States, more particularly Amendment 14, section 1, of said Constitution.

3. That the judgment entered by the Judge originally in the above entitled cause deferring the imposition of sentence from day to day and from month to month is unconstitutional, having violated the Constitutional rights of the defendant in regard to both the Constitution of the United States and the Constitution of the State of Florida.

The District Court of Appeal, First District of Florida, issued two decisions in determining the questions raised by the Assignments of Error heretofore c , both of which decisions are set out in the Appendix in full. (A. p. 1-13)

The following are pertinent quotations from the opinions mentioned above in which the Court directed its attention to the Federal questions presented:

". . . . Appellant here challenges the trial court's authority to defer sentence indefinitely, and asserts that the order of November 3, 1955, violates due process

of law as guaranteed by the Fourteenth Amendment of the United States Constitution, and the Declaration of Rights of the Florida Constitution. He therefore contends that such order was ineffectual insofar as it purported to continue the trial court's jurisdiction for the purpose of permitting it to impose the sentence contained in its order of December 18, 1956 . . . ." (R. 90) (A. p. 14)

". . . . It is apparent from the foregoing authority that the power of a trial court to suspend the imposition of sentence was originally approved under circumstances in which a temporary deferment was employed to permit accomplishment of some lawful purpose consistent with the ends of justice. By repeated practice these limitations became eroded and disregarded until the right to indefinitely postpone the imposition of a sentence came to be a recognized 'inherent' power. It is significant that in none of the cases through which this practice evolved has the Court been called upon to test its conformity to the state or federal constitutional guarantees of due process and a speedy trial . . . ." (R. 94) (A. p. 6)

". . . . As previously noted, it does not appear that our Supreme Court has been called upon to view this practice in light of the Florida or Federal Constitution as affected by our present parole and probation law. For these reasons we do not consider those cases which have heretofore approved the practice of indefinitely deferring sentence as controlling the question presented in the case at bar . . . ." (R. 96) (A. p. 9)

". . . . Instead, sentence was deferred for no stated lawful purpose but for an indefinite period, and defendant was released upon his own recognizance. That portion

of the order which purports to defer sentence we hold to have been beyond the court's jurisdiction and therefore violative of defendant's constitutional rights to due process of law . . . " (R. 97) (A. p. 9)

In the opinion rendered by the said District Court of Appeal, First District of Florida concerning case No. 11802, appears the following:

". . . . Appellant has challenged the jurisdiction of the trial court to indefinitely defer the imposition of sentence and retain jurisdiction of the cause for the entry of a subsequent sentence. It is contended that such procedure violates due process of law.

For the reasons stated in our opinion in the companion case of BATEH V. STATE, filed April 1, 1958, but not yet reported, we hold the trial court's order of November 3, 1955, to be void and of no effect insofar as it purports to defer sentence . . . " (R. 100) (A. p. 12)

The court, in denying the petitions of both parties for rehearing rendered an opinion which appears in full in Appendix (A. p. 14); the pertinent portions of which are as follows:

". . . Lastly, it is urged that the constitutional questions presented in this case have been heretofore considered by our Supreme Court; which consideration resulted in a decision contrary to that reached in our original opinion. This contention is founded upon the assertion that a review of the records of certain cases previously decided by the Supreme Court reveals that there were included among the various errors assigned for review certain questions as to other provisions of

the Florida and Federal Constitutions. Our review of those case records served only to re-affirm our prior opinion that our Supreme Court has not been called upon to consider the practice here questioned in light of the Florida or Federal Constitution as affected by our present parole and probation law ...." (R. 111) (A. p. 16, 17)

As was previously noted the District Court of Appeal, First District of Florida, on June 26, 1958, pursuant to the State's petition for modification, filed a revised and substituted opinion, which is set forth in full (A. p. 18), the pertinent portions of which are as follows:

"... It is urged that the constitutional questions presented in this case have been heretofore considered by our Supreme Court; which consideration resulted in a decision contrary to that reached in our original opinion. This contention is founded upon the assertion that a review of the records of certain cases previously decided by the Supreme Court reveals that there were included among the various errors assigned for review certain questions as to other provisions of the Florida and Federal Constitutions. Our review of those case records served only to re-affirm our prior opinion that our Supreme Court has not been called upon to consider the practice here questioned in light of the Florida or Federal Constitution as affected by our present parole and probation law. We recognize the rule cited in the State's petition that an affirmance on appeal concludes all questions that might have been raised by such appeal; but only insofar as it applies to the parties to the cause. It cannot be said that a person's right to an adjudication of a question of law on appeal is barred by the fact that such question *might have been*,

but was not raised by the parties to some prior and wholly unrelated cause . . . ." (R. 115-116) (A. p. 20, 21)

Thereafter, the Petitioner perpetuated the Federal questions in his petition for Writ of Certiorari (R. 136) which are quoted substantially as follows:

I

That the judgment and sentence entered by the Court on November 3, 1955, is contrary to the form and meaning of the Statutes of the State of Florida, more particluarly FSA 948.01 and 948.04.

II

That the judgment and sentence entered by the Court in the above entitled cause on the 3rd day of November 1955 violated defendant's Constitutional Rights under the Constitution of the State of Florida, more particularly Sections 1, 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida.

III

That the judgment and sentence entered by the Judge in the above entitled cause on the 3rd day of November, 1955 violated the Constitutional Rights of the defendant under the Constitution of the United States more particularly Amendment 14, Section 1, of the said Constitution.

IV

That the judgment and sentences entered by the Court on the 18th day of December, 1956 and on April 9, 1957, were contrary to the form and meaning of the

statutes of the State of Florida, more particularly FSA 948.01 and 948.04.

V

That the judgments and sentences entered by the Court in the above entitled cause on the 18th day of December, 1956 and on April 9, 1957, violated the defendant's Constitutional Rights under the Constitution of the State of Florida, more particularly Sections 1, 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida. (R. 138-139).

The Supreme Court of Florida, on February 25, 1959, handed down an opinion (R. 162--169) which denied Petitioner's Petition for Writ of Certiorarri and Respondent's Petition for Writ of Certiorari and Direct Appeal, and in the main adopted the decisions of the District Court of Appeal below. The aforesaid opinion of the Supreme Court of Florida is set out in full in the Appendix. (A. p. 23)

The Petitioner perpetuated the Federal questions again in his petition for rehearing, which questions were as follows:

.... (a) The Florida and/or United States Constitutional effect of this decision upon the Petitioner-Respondents, Mussa C. Bateh's rights,

(b) The power of the Trial Court to suspend the imposition of sentence without a showing of just cause,

(c) The inconsistency of the District Court of Appeal's decisions granting credit, nunc pro tunc, for the first thirteen months that elapsed between the adjudication of guilt and the imposition of the first two year sentence, and the failure to grant credit, nunc pro tunc, for the eighteen months period that elapsed between the adjudication of guilt and the imposition of the see-

ond two year sentence during which time Petitioner-Respondent was at liberty without bond after said adjudication of guilt. (R. 180-181)

On April 9, 1959, the Supreme Court of Florida, without opinion, denied Petitioner's petition for rehearing. (R. 184)

It is from this denial of Petitioner's Petition for Rehearing that this appeal is taken.

ARGUMENT

I.

That Petitioner's rights guaranteed him under Section 1, Amendment XIV of the Constitution of the United States were violated in that the "resentencing" imposed on December 18, 1956, was in derogation of his rights under the Constitution as aforesaid.

II.

That the Petitioner's rights guaranteed him under Section 1, Amendment XIV of the Constitution of the United States were violated in that the "resentencing" imposed on April 9, 1957, was in derogation of his rights under the Constitution as aforesaid.

III.

That the opinion of the District Court of Appeal, First District of Florida, and the opinion rendered on Rehearing by the District Court of Appeal, First District of Florida, violated the Petitioner's rights of due process by improperly interpreting Section 1, Amendment XIV of the Constitution of the United States.

For the sake of brevity argument on Questions I, II, and III will be consolidated.

The original petition to the District Court of Appeal filed by the Petitioner was based on the grounds that Petitioner's rights to due process of law as guaranteed under Section 1, Amendment XIV of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida, were violated by the procedure of the criminal court in having the Petitioner returned and resentenced at a later

date. The said District Court of Appeal in rendering its opinion agreed with Petitioner that his rights to due process had been violated when they stated as follows:

> "... sentence was deferred for no stated lawful purpose but for an indefinite period, and defendant was released upon his own recognizance. That portion of the order which purports to defer sentence we hold to have been beyond the court's jurisdiction and therefore violative of defendant's constitutional rights to due process of law ..." (R. 97) (A. p. 9)

In so holding the District Court of Appeal upset a long standing practice of deferring sentence indefinitely by Trial Courts in the State of Florida. However after striking down the practice the said District Court of Appeal went on to say in its opinion that the Trial Court had not lost jurisdiction for the purpose of imposing sentence and, therefore, the two year sentences which the Trial Court imposed in Petitioner's case some thirteen months and eight terms of court and eighteen months and ten terms of court later, respectively, were valid sentences and should be considered as taking effect nunc pro tunc as of the time Petitioner first appeared before the Trial Court November 3, 1955. It is the latter action of the said District Court of Appeal that the Petitioner seeks to have upset upon appeal.

The Constitutions of the State of Florida and of the United States guaranteed Petitioner the right to a speedy trial:

> Section 11, Declaration of Rights, Florida Constitution. "In all criminal prosecutions the accused shall have the right to a speedy and public trial. ..."

The Sixth Amendment of the Constitution of the United States:

> "In all criminal prosecutions the accused shall enjoy a

speedy and public trial . . . ."

Further, judicial decisions of both the State of Florida and the United States have consistently held that trial is not complete until sentence is imposed. Carnagio v. State, 143 Co. 162, United States v. Lecato, et al, 29 F. 2d, 694.

Thus Petitioner maintains that he had a right to a speedy trial and that said right was violated by an unreasonable delay in sentencing Petitioner. Note the Appellate Court below stated that "sentence was deferred for no stated lawful purpose but for an indefinite period of time". This being the case the Petitioner urges that his case is almost identical with the case of Mintie v. Biddle, 15 Fed (2d). 931, and following the reasoning of the Eighth Circuit Court of Appeals in that case there was no jurisdiction in Petitioner's case and therefore the Trial Court could not impose the sentences nunc pro tunc and the Court of Appeal below was in error in so holding.

In urging this conclusion Petitioner is not unmindful of this Court's opinion in Miller v. Aderhold, 288 U.S., 206, wherein it expressed the view that jurisdiction of the Trial Court was not exhausted until sentence is pronounced either at the same or a succeeding term of court. It is noted that in arriving at this conclusion the Court stated it could find no convincing reason in any of the cases for the theory that the Court would lose jurisdiction with the passing of the term. Petitioner would respectfully point out that following this line of reasoning the Court would retain jurisdiction for each succeeding term ad infinitum. Certainly somewhere along the line this theory would run head on into the theory that a defendant is entitled to a speedy trial. Petitioner respectfully suggests that his right to a speedy trial is a compelling reason for holding that where a trial court suspends imposition

of sentence for no lawful purpose it loses jurisdiction with the passing of the term or within some reasonable time within the meaning of due process. Certainly thirteen months and eight terms of court and eighteen months and ten terms of court do not constitute a reasonable delay.

IV.

That Petitioner's rights under Section 1, Amendment XIV of the Constitution of the United States were violated by the interpretation and application placed upon Florida Statutes 948.01, by the Appellate Courts of the State of Florida as applied to the instant case.

Petitioner contends that his rights to due process were violated by the manner in which the District Court of Appeal below interpreted the application of the following Statute. Florida Statutes 948.01.

> (4) In no case shall the imposition of sentence be suspended and the defendant thereupon placed on probation unless such defendant be placed under the custody of said parole commission except as provided in § 949.03 (B. 6)

The District Court, in its opinion, in effect held that because the Judge did not follow either of the two alternatives set forth in the said Statute, that is, the imposing of sentence or placing of Petitioner on parole in the custody of a probation officer, that portion of the order of November 3, 1955, purporting to defer sentence was void and of no effect. (A. p. 13) Therefore, when the Trial Judge subsequently sentenced the Petitioner on December 18, 1956 and April 9, 1957, said sentences were deemed to have been imposed as of November 3, 1955 in accordance with the terms of the cited statute. However Petitioner maintains that the Court erred in so doing because

the terms of the said statute were mandatory in stating that the Judge *shall* impose sentence or place the defendant on probation in accordance with the probation laws of the State of Florida.

Since neither alternative dictated by the above cited statute was followed it is Petitioner's contention that the Trial Court had no further jurisdiction in the case to impose sentence. The interpretation of the statute to the contrary by the District Court of Appeal in stating that the sentences later imposed by the Trial Court were operative as of November 3, 1955, violated Petitioner's rights to due process of the law since these sentences were imposed after the Trial Court lost jurisdiction in the matter.

CONCLUSION

Based on the above cited provisions of the Constitutions of the United States, and the State of Florida, the Statutes of the State of Florida, and the cases cited, Petitioner respectfully submits that the portion of the decision of the District Court of Appeal, First District of Florida, which held that the sentences of the Trial Court entered December 18, 1956 and April 9, 1957, were effective nunc pro tunc as of November 3, 1955, should be reversed.

Respectfully submitted.

LARKIN, LEWIS & DECKER

By _____

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APPENDIX I

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1958

MUSSA C. BATEH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

CASE NO. A-101

Criminal Court of Record Duval County, #11801

Opinion filed April 1, 1958

An Appeal from Criminal Court of Record, Duval County. Lloyd Layton, Judge

Larkin and Lewis, For Appellant.

Richard W. Ervin, Attorney General and David Tumin, Assistant Attorney General, For Appellee.

WIGGINGTON, J.

This is an appeal from judgment of conviction and sentence imposed by the Criminal Court of Record of Duval County in

a case arising under Chapter 398, Florida Statutes.

On August 30, 1955, appellant was informed against and charged in two counts with violating the provisions of Sec. 398.09 and Sec. 398.10, F.S., and upon arraignment entered a plea of nolo contendere. On November 3, 1955, he was adjudged guilty as charged. The trial court ordered that "... the passing of sentence herein be deferred from day to day and term to term until finally disposed of and the Court herein expressly reserves jurisdiction of this cause to impose sentence herein at a later date as the Court may deem advisable." Appellant was thereupon "released on [his] own recognizance." Thereafter, on December 18, 1956, appellant was brought before the court and a supplemental order was entered whereby the prior order of November 3, 1955, was "vacated and set aside" and sentence of two years in the state prison was imposed.

Appellant here challenges the trial court's authority to defer sentence indefinitely, and asserts that the order of November 3, 1955, violates due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution, and the Declaration of Rights of the Florida Constitution. He therefore contends that such order was ineffectual insofar as it purported to continue the trial court's jurisdiction for the purpose of permitting it to impose the sentence contained in its order of December 18, 1956.

The practice of deferring the imposition of sentence upon persons convicted of criminal offenses had its origin in the common law courts of England at a time when the laws of England did not permit motions for a new trial grounded upon the insufficiency of the evidence, or for alleged errors during the course of the proceedings. There the trial courts

assumed authority to temporarily suspend the imposition or execution of sentence by the issuance of a reprieve.(1) Such a reprieve was only temporary and granted in the court's discretion for the accomplishment of some lawful purpose.(2) These courts neither possessed nor claimed the right to indefinitely suspend the imposition or execution of sentence and thereby nullify the penalty lawfully prescribed upon conviction.

This practice subsequently became engrafted upon the jurisprudence of some of the United States without affirmative recognition of any common law doctrine in support thereof, and without regard to any legislative provisions for probation. Temporary deferment was utilized to afford time for a motion for new trial or in arrest of judgment; an application for pardon, or to enable the trial judge to conduct such pre-sentence investigation as may be necessary to the imposition of a proper sentence; and also where such action became expedient due to the pendency of another charge. Such procedure eventually came to be accepted by conscientious trial judges as a means of meeting modern notions regarding the treatment and rehabilitation of those who stood convicted for violation of the law. Having been once asserted, the practice continued solely as the result of prior precedent.(3)

The first approval of a deferred sentence recorded in this jurisdiction appears in EX PARTE WILLIAMS, decided in

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(1) HALE P. C., Ch., 58, p. 412

(2) See: 2 HAWK, P. C. Ch. 51, Sec. 8, re authority to grant reprieve pending a plea for pardon by the Crown.

(3) See: COMMONWEALTH v. DOWDICAN'S BAIL, (1874) 115 Mass. 133; STATE v. ADDY, (1881) 43 N.J. Law 113.

1890,(4) wherein our Supreme Court observed ad dictum "... that sentence may be suspended on conviction of an offender, because of mitigating circumstances, or the pendency of another indictment, or other sufficient cause, is not denied and in practice is frequently done in this state, and in other states is held to be permissible." It is to be noted that this affirmation relates to suspensions which are temporary and for sufficient cause, without regard to statutory or inherent authority but predicated upon the bare assertion that such had been the practice.

Later, in 1907, the Supreme Court, again in dictum, acknowledge the right of Florida trial courts within definitely restricted limitations, to suspend the imposition of sentence.(5) But, "The power of such a court to suspend the execution of a sentence already lawfully imposed, except for purpose of giving effect to an appeal, or where cumulative sentences are imposed, and perhaps in some cases of necessity, presents another question. It seems to us the weight of reason and authority is against the existence where, as with us, exclusive control over the subject of pardons and the commutation and mitigation of penalties is lodged by our constitution in other officials than the judges of the court."(6) These decisions recognize no reason which supports a distinction between the court's authority to indefinitely defer sentence, and its power to indefinitely suspend the execution of sentence.

In the subsequent development of our jurisprudence trial courts, in the interest of justice, attempted by the practice of deferring imposition of sentence to administer a system of

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(4) 26 Fla. 310, 8 So. 425.

(5) TANNER v. WIGGINS, 54 Fla. 203, 45 So. 459.

(6) All emphasis supplied by this court.

unsupervised probation without facilities or funds necessary to accomplish the purpose which probation is intended to serve. In recognition of the desirable object of such practice, the Supreme Court, in 1932, held(7) that the trial court was authorized to suspend the imposition of sentence after judgment of conviction "from day to day and term to term". It is here noted that this holding was based upon the Williams case, supra, and concerned a situation in which the trial court entered its judgment of conviction during the April Term of court, which ended June 8, 1931, and imposed sentence at the succeeding term on September 29, 1931. The latter order was attacked on the ground that the trial court was without jurisdiction to impose sentence after adjournment for the Term during which conviction and judgment had been entered upon the record. A similar holding is reported in a decision rendered by the Supreme Court in 1938.(8)

In BRONSON v. STATE(9), decided in 1941, the defendant had been adjudged guilty. Judgment of conviction was entered, sentence was suspended and defendant was paroled into the custody of the probation officer of the court for a period of one year. The trial court subsequently revoked its probation order and sentenced the defendant to six months in the county jail. After observing that the record contained no evidence that the judge abused a sound judicial discretion "... in revoking the custody and imposing a lawful sentence ...", the Supreme Court stated: "There is nothing in the statutes to limit or restrain the court's inherent power to suspend pronouncement of sentence, once having entered a

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(7) CARNAGIO v. STATE, 106 Fla. 209, 143 So. 162.

(8) CAMPBELL v. STATE, 131 Fla. 135, 179 So. 137.

(9) 148 Fla. 188, 3 So. 2d 873.

judgment of conviction upon a plea of guilty, or to prevent the imposition of the sentence pronounced in this case." In support of this proposition the Court relied upon its former decisions as set forth above, and for the first time a suspension of sentence was claimed as a valid exercise of the trial court's inherent power.

The inherent power doctrine was again applied in PINKNEY v. STATE(10) in which case the Supreme Court observed: "It has always been the law of this jurisdiction that, except in cases involving suspension of the imposition of sentence on terms and conditions to be kept or observed by a defendant, or of cases involving probation under the statutes, a trial judge who has deferred the imposition of sentence upon a defendant may proceed to impose sentence upon him at any time, either during the term in which guilt is admitted or established or at a later term, without the necessity of first according to the defendant a hearing on the question of his good behavior."

It is apparent from the foregoing authority that the power of a trial court to suspend the imposition of sentence was originally approved under the circumstances in which a temporary deferment was employed to permit accomplishment of some lawful purpose consistent with the end of justice. By repeated practice these limitations became eroded and disregarded until the right to indefinitely postpone the imposition of a sentence came to be a recognized "inherent" power. It is significant that in none of the cases through which this practice evolved has the Court been called upon to test its conformity to the state or federal constitutional guarantees of

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(10) 160 Fla. xxx, 37 So. 2d 157.

due process and a speedy trial.(11) Nor has the practice of indefinite deferment been reconciled with the exclusive power of the executive department of our state government to grant pardons and the equally exclusive delegation of the power to enact laws to the legislature.

It is inescapable that any order which indefinitely suspends the imposition of a lawful sentence or stays the execution of such sentence after it has been imposed has the effect of either nullifying the law, or of placing the convicted party on probation, or awarding a conditional pardon. In the earlier development of this practice our trial courts were doubtless motivated by the philosophy that one convicted of a crime should not suffer the severe penalty prescribed by law, if, in the court's sound discretion, the probable future conduct of the defendant, the end of justice and the welfare of society warranted action by the court to effect a rehabilitation of the convicted party through a suspended sentence. Such a philosophy is, we believe, inconsistent with the doctrine which vests the lawmaking authority in the legislative branch of our government and the power to pardon in the executive. It has long been the law in this State: That in all cases the court shall award the sentence and fix the punishment or penalty prescribed by law."(12)

In 1941, the legislature, by enactment of Chapter 948, F.S., limited the authority by which imposition of a sentence may be deferred. Section 948.01(3), F.S., provides that ". . . . if it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of

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(11) See: CARNAGIO v. STATE, Supra Note 7, wherein the Florida Court held that a trial is not complete until sentence is passed.

(12) Sec. 919.23 (1), F.S.

conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion may thereupon stay and suspend the imposition of sentence upon such defendant and shall place him upon probation under the supervision and control of the Parole Commission for the duration of such probation . . .;" and Sec. 948.01 (4), F.S., provides: "In no case shall the imposition of sentence be suspended and the defendant thereupon placed on probation unless such defendant be placed under the custody of said Parole Commission except as provided in Section 949.03." That the limitation upon the court's authority to indefinitely suspend the imposition of sentence is now the recognized law in this jurisdiction is clear from the court's decision in EX PARTE BOSSO(13) wherein it was held that suspension was permissible "only" in accordance with Chapter 948, F.S. Therefore, any action by a trial court in suspending sentence indefinitely, with the result that the defendant is placed on unsupervised probation, would constitute infringement upon the powers lawfully delegated to the executive branch of our government.

We are not unmindful of the fact that the Pinkney case(14) by implication recognizes the existence of two distinct systems of probation, both executive and judicial. Nor have we lost sight of the holding in COLLINGSWORTH v. MAYO(15) in which our Supreme Court re-affirmed the trial court's indefinite deferral of sentence on the authority of its prior de-

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(13) (Fla. 1949) 41 So. 2d 322; see also McMAHON v. MAYO, (Fla. 1957) 92 So. 2d 806, in which a trial court's order indefinitely suspending the execution of sentence was held void.

(14) Supra note 16.

(15) (Fla. 1955) 77 So. 2d 843, see also: MOUTOS v. STATE, (Fla. 1950) 47 So. 2d 841.

cisions which have been heretofore discussed in this opinion. As previously noted, it does not appear that our Supreme Court has been called upon to view this practice in light of the Florida or Federal Constitution as affected by our present parole and probation law. For these reasons we do not consider those cases which have heretofore approved the practice of indefinitely deferring sentence as controlling the question presented in the case at bar.

The appellant in this case was adjudged guilty of the offenses charged on November 3, 1955. Upon that judgment the trial court had the alternative, absent some sufficient and lawful reason for temporary delay, of passing sentence forthwith in accordance with the statute prescribing the penalty upon conviction of the crimes charged, or he could have suspended the imposition of sentence and placed the defendant on probation as provided in Chapter 948, F.S. Neither alternative was followed: Instead, sentence was deferred for no stated lawful purpose but for an indefinite period, and defendant was released upon his own recognizance. That portion of the order which purports to defer sentence we hold to have been beyond the court's jurisdiction and therefore violative of defendant's constitutional rights to due process of law. The sentence subsequently imposed by the trial court, ordering defendant imprisoned in the state prison for a term of two years, is within the limitations of the punishment prescribed by the statute under which defendant was convicted. Had this sentence been imposed at the time prescribed by law it would have become effective on November 3, 1955, the date defendant was adjudged guilty. This is so fas the reason that the trial court elected at that time not to place defendant on probation in accordance with the provisions of Chapter 948, F.S. We, therefore, hold that the sentence imposed upon defendant on December 18, 1956, became effec-

tive November 3, 1955, nunc pro tunc. Thus defendant's two year term shall be deemed to have commenced as of the date last mentioned and must now be considered to have been fully served. In so holding it is not the intention of this court to abrogate the trial court's power to temporarily suspend the imposition of sentence in a criminal cause from time to time, and, if deemed necessary, from term to term, for the purpose of determining motions and other matters arising between verdict and judgment, such as gaining information necessary to the imposition of a just sentence; or during the pendency of other charges, or for other good and valid reasons. We merely hold that a trial court cannot by the artifice of postponing the pronouncement of sentence exercise the power to conditionally parole or pardon a defendant who stands convicted of a crime.

For the reasons stated herein the cause is remanded with directions to enter an appropriate order discharging the prisoner and his bondsmen.

CARROLL, J. and REVELS, A. J., CONCUR.

APPENDIX II

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1958

MUSSA C. BATEH,

Appellant.

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

DISTRICT COURT NO. A-118

CRIMINAL COURT OF RECORD OF DUVAL COUNTY
No. 11802

Opinion filed April 1, 1958.

An Appeal from the Criminal Court of Record, Duval County.

Lloyd Layton, Judge.

Larkin & Lewis, for Appellant.

Richard W. Ervin, Attorney General and David U. Tumin, Assistant Attorney General, for Appellee.

WIGGINGTON, J.

This is an appeal from judgment of conviction and sen-

tence imposed by the Criminal Court of Record of Duval County in a case arising under Chapter 398, Florida Statutes. It is a companion case to that of MUSSA C. BATEH v. STATE OF FLORIDA, both cases having been consolidated on appeal for the purpose of oral argument.

On August 30, 1955, appellant was informed against and charged in two counts with violating the provisions of §398.09 and §398.10, F.S., and upon arrignment entered a plea of nolo contendere. On November 3, 1955, he was adjudged guilty as charged. The trial court ordered that "... the passing of sentence herein be deferred from day to day and term to term until finally disposed of and the Court herein expressly reserves jurisdiction of this cause to impose sentence herein at a later date as the Court may deem advisable." Appellant was thereupon "realesed on [his] on recognizance." Thereafter, on April 9, 1957, appellant was brought before the court and a supplemental order was entered whereby defendant was sentenced to imprisonment in the state prison for a term of two years. This sentence was to commence from the date of completion of a sentence previously imposed pursuant to a judgment of conviction under a separate and distinct information (the case being #11801).

Appellant has challenged the jurisdiction of the trial court to indefinitely defer the imposition of sentence and retain jurisdiction of the cause for the entry of a subsequent sentence. It is contended that such procedure violates due process of law.

For the reasons stated in our opinion in the companion case of BATEH v. STATE, filed April 1, 1958, but not yet reported, we hold the trial court's order of November 3, 1955, to be void and of no effect insofar as it purports to defer sentence. The

sentence subsequently imposed on April 9, 1957, complies with the law and is construed to have become effective November 3, 1955, nunc pro tunc. Therefore, the sentence imposed herein shall be deemed to have commenced upon completion of the prior sentence imposed by the trial court in the companion case mentioned above.

Accordingly, the cause is herewith remanded for the entry of an appropriate order and committment giving effect to the views herein expressed.

CARROLL, J. and REVELS, P. B., A.J., CONCUR.

APPENDIX III

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1958

MUSSA C. BATEH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. A-101

Criminal Court of Record Duval County, #11801

On Petition for Rehearing filed April 29, 1958.

An Appeal from Criminal Court of Record, Duval County. Lloyd Layton, Judge

Larkin and Lewis, for Appellant.

Richard W. Ervin, Attorney General and David U. Tumin, Assistant Attorney General, for Appellee.

WIGGINGTON, J.

ON PETITION FOR REHEARING

Pursuant to petitions for rehearing filed by the parties, we have carefully reconsidered the record and briefs herein.

By its petition the State quite ably points to the fact that the question as to whether the trial court's orders indefinitely

deferring the imposition of sentence were violative of defendant's constitutional rights was not raised before that court; and insists that this court overlooked the established and accepted rule that questions not presented in the trial court will not be considered on appeal. This rule, which is procedural in nature, has as its purpose the prevention of unlimited litigation through the device of propounding new questions at each stage of an appeal. Its application should not be withheld, unless it be shown that such would serve to defeat the administration of fundamental justice.(1) This exception is fully recognized by the Statute(2) governing the scope of appellant review of criminal matters which provides, inter alia: The [appellate] court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appears in the appeal papers . . ." Further, it is the established law of this jurisdiction that the appellate court may, in its discretion, consider, sua sponte, the legality of the sentence imposed in any case it may be called upon to review, whether or not such sentence was assigned as error on appeal.(3) In view of the principles hereinbefore delineated, we do not believe the right to a review should be withheld merely because of the accused's failure to challenge the deferment of sentence at trial.

The State's petition also directs our attention to Section 775.14, F.S., which provides: "Any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld."

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(1) See: DEWEY v. STATE, 135 Fla. 443, 186 So. 224.

(2) Section 924.32(1), F.S., 1955. See also: Rule 6.16, F.A.P.

(3) See: LEWIS v. LEWIS, 154 Fla. 825, 19 So. 2d 199.

It is contended that this section constitutes the only lawful restriction on a trial court's power to defer the imposition of sentence upon one properly convicted and adjudged guilty of a crime. This, upon the theory that the cited statute constitutes legislative recognition and approval of such practice. It is noted at the outset that this statute did not become law until after entry of the orders herein complained of, and, therefore, cannot be considered as controlling in any way the ultimate decision in the instant case.(4) Suffice it to say we do not construe this statute as a recognition of an inherent judicial power to indefinitely defer the imposition of a sentence. Legislative recognition of a judicial practice does not serve to establish such practice as being within a court's inherent powers. Such powers vest by virtue of the very nature of the judiciary and are not the subject of legislative fiaunt. Nor for that matter do we interpret this statute as a legislative grant of such power without restriction.

Lastly, it is urged that the constitutional questions presented in this case have been heretofore considered by our Supreme Court, which consideration resulted in a decision contrary to that reached in our original opinion. This contention is founded upon the assertion that a review of the records of certain cases previously decided by the Supreme Court reveals that there were included among the various errors assigned for review certain questions as to other provisions of the Florida and Federal Constitutions. Our review of those case records served only to re-affirm our prior opinion that our Supreme Court has not been called upon to consider the practice here questioned in light of the Florida or Federal Constitution as affected by our present parole and probation

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(4) Ch. 57-284, Laws of Florida, 1957. (Filed in Office of Secretary of State, May 31, 1957.)

law. We recognize rule cited in the State's petition that an affirmance on appeal concludes all questions that might have been raised by such appeal; but only insofar as it applies to the parties to the cause. It cannot be said that a person's right to an adjudication of a question of law on appeal is barred by the fact that such question might have been, but was not raised by the parties to some prior and wholly unrelated cause.

In all fairness it must be said that the action of the trial court in this case conformed to a practice which is by no means novel in this jurisdiction. It is this practice, and not the trial court, that we condemn.

For the reasons hereinabove stated the petitions for rehearing are denied.

CARROLL, DONALD J. and REVELS, P. B., A. J., CONCUR.

APPENDIX IV

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1958

MUSSA C. BATEH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. A-101

Opinion filed June 26, 1958.

An Appeal from the Criminal Court of Record, Duval County, Lloyd Layton, Judge.

Larkin & Lewis, for Appellant.

Richard W. Ervin, Attorney General, and David U. Tumin, Assistant Attorney General, for Appellee.

REVISED AND SUBSTITUTED OPINION ON REHEARING

WIGGINGTON, Acting Chief Judge.

The opinion of this court entered on petition for rehearing in the above styled cause (reported at 101 So. 2d 874) is hereby withdrawn and held for naught. The following is substituted in lieu thereof:

Pursuant to petitions for rehearing filed by the parties, we have carefully reconsidered the record and briefs herein.

By its petition the State quite ably points to the fact that the question as to whether the trial court's orders indefinitely deferring the imposition of sentence were violative of defendant's constitutional rights was not raised before that court; and insists that this court overlooked the established and accepted rule that questions not presented in the trial court will not be considered on appeal. This rule, which is procedural in nature, has as its purpose the prevention of unlimited litigation through the device of propounding new questions at each stage of an appeal. Its application should not be withheld, unless it be shown that such would serve to defeat the administration of fundamental justice.(1). This exception is fully recognized by the Statute(2) governing the scope of appellate review of criminal matters which provides, inter alia: "The [appellate] court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appears in the appeal papers . . ." Further, it is the established law of this jurisdiction that the appellate court may, in its discretion, consider, sua sponte, the legality of the sentence imposed in any case it may be called upon to review, whether or not such sentence was assigned as error on appeal.(3) In view of the principles hereinbefore delineated, we do not believe the right to a review should be withheld merely because of the accused's failure to challenge the deferment of sentence at trial.

The State's petition also directs our attention to Section

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(1) See: DEWEY v. STATE, 135 Fla. 443, 186 So. 224

(2) Section 924.32(1), F.S., 1955. See also: Rule 6.16, F.A.R.

(3) See: LEWIS v. STATE, 154 Fla. 825, 19 So. 2d 199

775.14, F.S., which provides: "Any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld." It is contended that this section constitutes the only lawful restriction on a trial court's power to defer the imposition of sentence upon one properly convicted and adjudged guilty of a crime. This, upon the theory that the cited statute constitutes legislative recognition and approval of such practice. It is noted at the outset that this statute did not become law until after entry of the orders herein complained of, and, therefore, cannot be considered as controlling in any way the ultimate decision in the instant case.(4) Suffice it to say we do not construe this statute as a recognition of an inherent judicial power to indefinitely defer the imposition of a sentence. Legislative recognition of a judicial practice does not serve to establish such practice as being within a court's inherent powers. Such powers vest by virtue of the very nature of the judiciary and are not the subject of legislative fiaunt. Nor for that matter do we interpret this statute as a legislative grant of such power without restriction.

It is urged that the constitutional questions presented in this case have been heretofore considered by our Supreme Court, which consideration resulted in a decision contrary to that reached in our original opinion. This contention is founded upon the assertion that a review of the records of certain cases previously decided by the Supreme Court reveals that there were included among the various errors assigned for review certain questions as to other provisions of the Florida and

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(4) Cr. 57-284, Laws of Florida, 1957. (Filed in Office of Secretary of State, May 31, 1957.)

Federal Constitutions. Our review of those case records served only to re-affirm our prior opinion that our Supreme Court has not been called upon to consider the practice here questioned in light of the Florida or Federal Constitution as affected by our present parole and probation law. We recognize the rule cited in the State's petition that an affirmance on appeal concludes all questions that might have been raised by such appeal; but only insofar as it applies to the parties to the cause. It cannot be said that a person's right to an adjudication of a question of law on appeal is barred by the fact that such question might have been, but was not raised by the parties to some prior and wholly unrelated cause.

The office of the Attorney General, in carrying out its statutory obligation, has called to our attention certain language used in our main opinion herein which we must agree was erroneous. That language follows the holding that defendant's sentence shall be deemed to have commenced on November 3, 1955, nunc pro tunc. It is to the effect that the sentence "... must now be considered to have been fully served"; and remands the cause for the entry of an appropriate order "discharging the prisoner and his bondsmen." This was error for the reason that defendant filed his notice of appeal and posted a supersedeas bond on December 18, 1956. Under §924.14, F.S., "The execution of a sentence ... is stayed upon the taking of the appeal and the defendant may be released on bail ..." (Emphasis supplied.) Thus, the execution of sentence must be deemed stayed for the period during which the defendant enjoys bail pending appeal.

Accordingly, we hereby modify our original opinion to the extent that the above quoted language, which states defendant's sentence "... must now be considered to have been fully served"; and requires the entry of an order "... discharg-

ing the prisoner and his bondsmen," is deleted.

In all fairness it must be said that the action of the trial court in this case conformed to a practice which is by no means novel in this jurisdiction. It is this practice, and not the trial court, that we condemn.

For the reasons hereinabove stated the petitions for rehearing are denied.

CARROLL, DONALD, J. and REVELS, P. B., A.J., CONCUR.

APPENDIX V

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1959

STATE OF FLORIDA,

Petitioner,

vs.

MUSSA C. BATEH,

Respondent.

CASE NO. 29,575

MUSSA C. BATEH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 29,576

STATE OF FLORIDA,

Appellant,

vs.

MUSSA C. BATEH,

Appellee.

CASE NO. 29,574

Opinion filed February 25, 1959

Petitions for Certiorari and an Appeal from District Court of Appeal, First District (Consolidated cases)

Richard W. Ervin, Attorney General and David U. Tumin, Assistant Attorney General, for Petitioner-Appellant

Larkin & Lewis, for Respondent-Appellee

THOMAS, J.:

Upon the filing of the petition of the State for a writ of certiorari to review a decision of the District Court of Appeal, First District, in Bateh v. State, Fla., 101 So. 2d 869, the court proceeded to hear argument on this and two allied matters. We now undertake to answer the pivotal question common to all three cases.

A more complete statement of the facts relevant to this controversy may be found in the opinion of the district court of appeal, however for the convenience of the reader, we relate the salient ones here.

Two informations were filed in the Criminal Court of Record of Duval County 30 August 1955. Each charged respondent Mussa C. Bateh, in separate counts, with two violations of the narcotics law. Chapter 398, Florida Statutes 1955, and F.S.A. On 3 November 1955 the defendant entered a plea of nol contendere to each information. The judge thereupon found the defendant guilty of the infractions but inflicted no punishment upon him. Instead, he announced that sentencing would be deferred from day to day and term to term, and jurisdiction would be reserved for that purpose until such later date, as he might deem it advisable to exercise it.

About a year later, the judge, evidently because he was

apprised of three charges that had subsequently been placed against Bateh for violations of the same law, held an inquiry about respondent's conduct while he was at large on his recognizance. It should be noted here that the judge at the beginning of the hearing expressly stated that he had not placed the defendant on probation.

Following the inquiry, the judge vacated the order holding in abeyance the imposition of sentence and sentenced Bateh to serve two years in the state penitentiary for perpetration of the offences charged in the first information. Later, on 9 April 1957, the judge sentenced Bateh to a like term for the offenses charged in the second information, and ordered that the terms be served consecutively.

Upon the imposition of each sentence an appeal was taken. For logical reasons well stated, the court held that the open, unqualified, order of the trial judge deferring the imposition of sentence until such time as he considered it advisable to exercise jurisdiction was void, and that the penalties eventually fixed became effective nunc pro tunc the day respondent was adjudged guilty. And, according to the opinion on rehearing, the length of service was to be computed from that day without credit, however, for the period during which the supersedeas bonds were in effect.

It is the gist of the opinion of the district court of appeal that the practice of deferring the imposition of sentences had developed through years of usage, probably as a means to trial judges of meeting situations in which immediate passage of sentence might result in hardship or even injustice and that recognition and sanction of the procedure to which the trial judge resorted for one lawful purpose or another had occurred so often that the practice, by force of pyramided

judicial opinions, had come to be regarded as the exercise of a right inherent in the courts. The so-called inherent right, said the district court of appeal, was a concept having no firm foundation. During much or most of the time the practice was developing no method for placing convicted persons on probation had been established and, as the district court indicated in its opinion, doubtless it derived from an effort to meet a need that was supplied by the enactment of Chapter 948, supra, in 1941.

Under the ruling of the district court of appeal a trial judge is, upon adjudicating the guilt of one convicted of crime, restricted to two courses, that is, he can either sentence the convict or place him on probation. The state contends that this decision is in direct conflict with decisions of this court on the same point of law, i.e., the power of a trial court to withhold the passing of sentence without placing the guilty defendant on probation. We think the state's position is sound and that, therefore, this court, by virtue of Section 4(2), Article V of the Constitution as amended in 1956, is vested with jurisdiction to entertain, and is obligated to discuss and decide that phase of this controversy. But because of a curious sequence of events affecting this very litigation, the conclusion that a conflict arose between the decision of the district court of appeal and decisions of this court on the same point of law does not, *ipso facto*, result in an order interfering with that court's decision.

In a series of cases decided by the Supreme Court and cited here by the state there is consistency in the announcements that a trial judge could defer the passing of sentence from time to time and term to term and impose the sentence at any time. Illustrative of these cases are the following citations taken from the petition of the Attorney General: Car-

nagio v. State, 106 Fla. 209, 143 So. 162; Campbell v. State, 131 Fla. 135, 179 So. 137; Bronson v. State, 148 Fla. 188, 3 So. 2d 873; Pinkney v. State, 160 Fla. 884, 37 So. 2d 157; and Collingsworth v. Mayo, Fla., 77 So. 2d 843. The last two of these were decided after Chapter 948, supra, the probation act, became a law, 1 July 1941; the others before that time.

In Pinkney v. State, decided in 1948, and Collingsworth v. Mayo, decided in 1955, the court clung to the view that the right to delay indefinitely and unqualifiedly the passing of sentences inhered in the trial courts. In the latter, and later, decision the court repeated the language used in Pinkey v. State, supra, that it had "always been the law of this jurisdiction that, except in cases involving suspension of the imposition of sentence [conditionally] or • • • *cases involving probation under the statutes*, a trial judge who has deferred the imposition of sentence • • • may proceed to impose sentence • • • at any time • • •." (Italics supplies.) Among the decisions as authority for this pronouncement are Carnagio v. State and Campbell v. State, both supra.

The importance of the italicized language and the citation of cases decided before the year 1941 is that the court in this decision of 1955 bridged the probation law and declared, in effect, that even afterward the trial court had inherent power to suspend the imposition of a sentence and pronounce it later regardless of probation as it had said, in the pre-probation act cases cited as authority, the trial court could do.

Such was the state of the law when the opinion in Bateh v. State, supra, was rendered so, to repeat for emphasis, an obvious conflict was created. But, strangely enough, as already intimated, this court in Helton v. State, Fla., 106 So. 2d 79, adopted, in the main, the reasoning on this subject

enunciated in the opinion in Bateh v. State, supra, and expressly modified the opinion in Collingsworth v. State, supra, and cases cited in it.

It is plain then, from the language in Helton v. State, supra, that the power of trial judges to hold in abeyance the passage of sentences and to impose them any time in the future, regardless of probation, is disapproved. For procedural reasons such as the determination of "motions and other matters arising between verdict and judgment, [or for the purpose of] gaining information necessary to the imposition of a just sentence; or during the pendency of other charges, or for other good and valid reasons," to quote from Beteh v. State, supra, the language copies in Helton v. State, supra, there may be justifiable delay, and when convicts are put on probation the sentences, of course, may be deferred conditioned on obedience to the terms of probation. But it was plainly the view of the district court, and it is now the view of this court, that one convicted of an offense is entitled to know just when in his life, he meanwhile being at liberty, he is no longer subject to the power of the court to translate his liberty to imprisonment. It will be recalled that in the Helton case the convict was brought into court and sentenced after being at large for 12 years.

Following the strange, or odd, turn in the course of this litigation we have come to the conclusion that this court, although it gained jurisdiction because of a conflict between the decision of the district court of appeal in Bateh v. State, supra, and prior decisions of this court on the same point of law, cannot disturb the judgment of that court because it has, meanwhile, resolved the conflict by adopting, on the principal point involved, the decision of the district court.

The upshot of this discussion is that when a person is adjudged guilty of an offense the trial judge should, in the absence of the circumstances outlined, either sentence him or place him on probation. This procedure would obviate for all time the possibility that a convict wandering around because he had not been actually sentenced could be summoned into court at any time, regardless of the march of years, and sentenced for a term which would long since have expired had it been imposed in the beginning. No charge has been made in these cases, nor is there any suspicion, that the trial judges were actuated by any but the highest motives, or doing anything that had not been sanctioned by decisions of this court, but if the ruling is followed the administration of criminal justice will, we think, be more orderly, more sure and more humane.

Such situations arising after the day Sec. 775.14, Florida Statutes 1957, became effective will be governed by that act. Although the ruling by the district court of appeal in this case and the ruling of this court in the Helton case were based on dissimilar factual situations, the effect of them gives an opportunity for argument that they are in conflict.

In the Helton case this court simply held that when the maximum time for which a sentence could have been fixed had expired the court had lost the power to pass any sentence at all. In the present case the district court of appeal held that when the trial court belatedly exercised its power to sentence it could do so only by making the sentence effective for a period beginning at the time of adjudication of guilt, with exceptions it is not necessary to repeat.

It is our view that the inconsistency between the decisions in this regard is more apparent than real and that they may

be logically harmonized. When a trial court has delayed the sentence the power to sentence must be exercised before the lapse of the extreme period for which sentence could have been imposed, and when it is inflicted the term cannot be projected beyond the extreme period.

So, on the prima facie showing that a conflict was created the writ of certiorari should issue, but it having been decided upon study that no such conflict in reality arose, the writ is discharged.

This decision disposes also of the appeal of the state and the petition of the respondent for certiorari all of which were consolidated for presentation by brief and oral argument.

TERRELL, C.J., DREW, THORNAL and O'CONNELL, J.J., concur